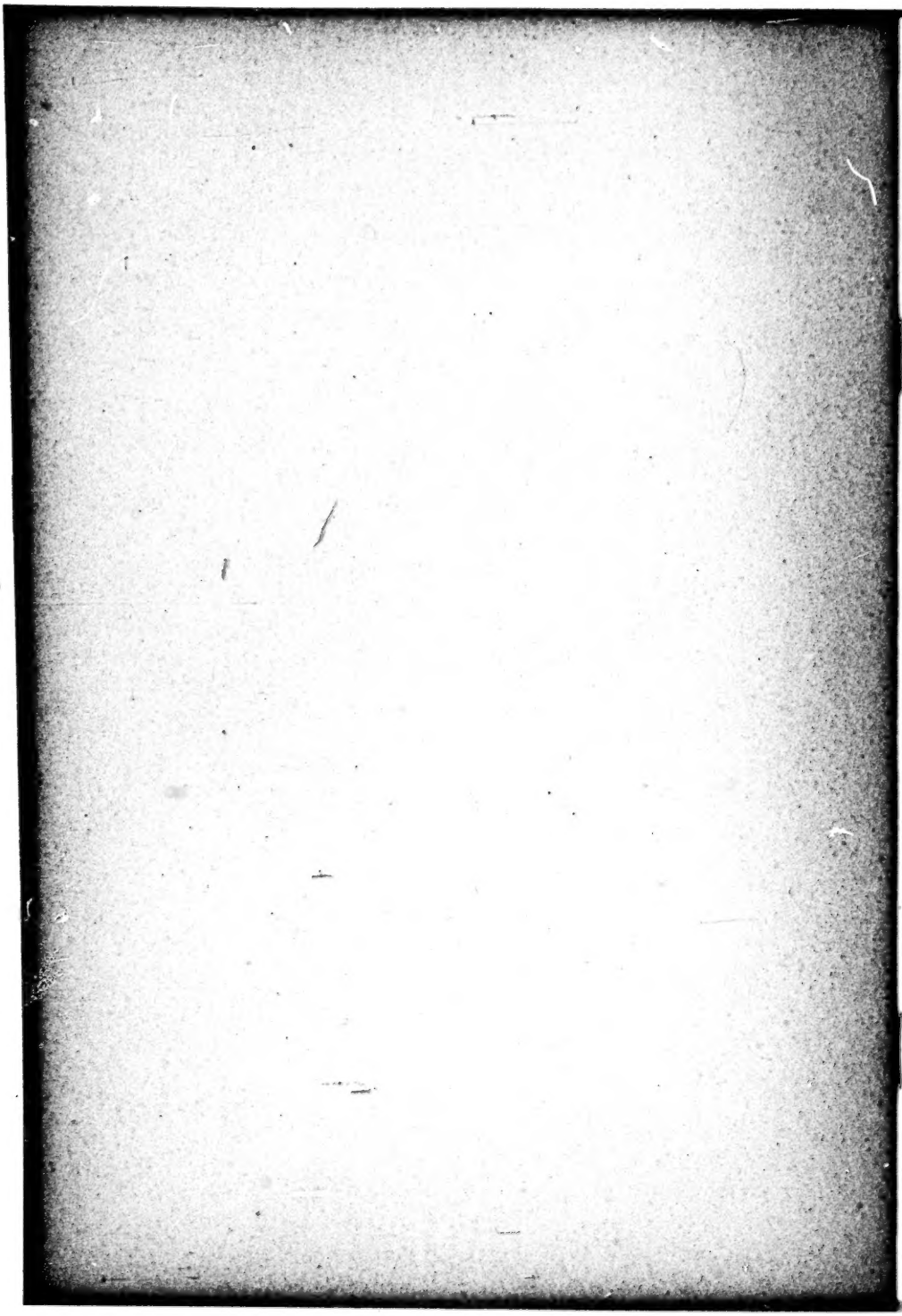

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-215

UNITED STATES OF AMERICA, Petitioner

v.

JOHN R. PARK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions in the court of appeals are printed as Appendix A, pp. 1A-12A, to the petition and reported in 499 F.2d at 839.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1974. On July 26, 1974, Mr. Chief Justice Burger extended to August 31, 1974, the time within which to file a petition for a writ of certiorari. The petition was filed on August 30, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In the trial of an individual charged with the crime of doing or causing acts resulting in the adulteration of food:

(a) should the trial court have instructed the jury that the prosecution was not required to show any wrongful intent or awareness of wrongdoing by the accused, but was required to show some act or acts of commission or ommission by the accused which caused the adulteration of the food; and

(b) did the trial court confuse the jury by instructing them, in language quoted from the dissenting opinion of Mr. Justice Murphy in *United States* v. *Dotterweich*, 320 U.S. 277, 285-86, that the accused might be convicted if the jury found that he held a position of "authority and responsibility" in the business of the corporation of which he was president, without regard to his personal responsibility, if any, for the acts which caused the adulteration of the food?

2. In the prosecution conducted below on the erroneous theory that the accused might be convicted merely by showing that he held a position of authority and responsibility in a corporation, did the prosecution's introduction

of evidence of an alleged prior offense, remote as to both time and place, require reversal since, on the prosecutor's own theory, there was no need which would outweigh the prejudice resulting from such evidence (although in a retrial conducted in accordance with the majority opinion in *Dotterweich*, 320 U.S. 277, such evidence might be admissible)?

STATUTE INVOLVED

Section 301(k) of the Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1042, as amended, 21 U.S.C. § 331(k), provides:

> The following acts and the causing thereof are prohibited:
>
> * * * * *
>
> (k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

STATEMENT

Respondent John R. Park was tried in the United States District Court for the District of Maryland for alleged violations of Section 301(k) of the Food, Drug and Cosmetic Act, *supra*, based on the presence of rodents in a portion of the Baltimore warehouse of Acme Markets, Inc.

1. Acme is a national retail food chain employing approximately 36,000 persons in 874 retail outlets. The company has twelve main warehouses and four special

warehouses. Park is President and chief executive officer with his office in Acme's corporate headquarters in Philadelphia (App. 5A n.5; Joint Appendix 41).

Acme's "Division 6" is headed by a Divisional Vice President with his office in Towson, Maryland, and consists of a warehouse complex in Baltimore and approximately 110 retail outlets. The Baltimore warehouse was described as a large complex of approximately 250,000 square feet including an "older building" of three stories with a basement. An inspection of this facility, which took 12 days in November and December 1971, discovered rodent infestation in a portion of the basement of the older building (J.A. 18-20). The government's own evidence established that "a great deal of effort was made in the way of cleaning up the warehouse" (J.A. 23) following the 1971 inspection, and also that there was some evidence of infestation by mice during a subsequent inspection in March 1972. At least one structural deficiency which might have contributed to the March 1972 infestation—a rusted door—was not noticed by the Food and Drug Administration until the second inspection (J.A. 26).

An informal hearing was held in June 1972 at the local office of the FDA in Baltimore and was attended by the Divisional Vice President and other officers of Acme, not including Park. No further action was taken by the FDA until March 1973 when a five-count information was filed in the District Court charging Acme and Park with violations of 21 U.S.C. § 331(k), quoted *supra* at p. 3, which prohibits adulteration of foods shipped in interstate commerce while held for sale. Four counts related to violations discovered in the November and December 1972 inspection; the fifth count involved a single violation found in the March 1972 inspection.

Prior to trial, Park filed a Motion for Bill of Particulars (J.A. 10) seeking the particulars of Park's alleged liability for the violations. The government re-

sponded to the motion by disclosing that the evidence would not show that defendant Park personally performed any of the acts described in the information but that "the Government's evidence will simply show that the defendant was a corporate officer who, under law, bore a relationship to the receipt and storage of food which would subject him to criminal liability under *United States* v. *Dotterweich,* 320 U.S. 277 (1943)" (J.A. 14-15). The trial court accordingly declared moot the Motion for Bill of Particulars.

The government demanded trial to a jury. Prior to the commencement of the trial, defendant Acme Markets, Inc. pleaded guilty to each count. Notwithstanding Acme's plea, and over objection by respondent Park, the prosecutor submitted detailed evidence concerning each of the alleged violations. No evidence was presented that any contaminated food had actually been offered for sale.

The government's evidence against Park consisted largely of a reading of the By-Law of Acme Markets, Inc. which stated that the chief executive officer of the company had "general and active supervision of the affairs, business, offices and employees of the company" (J.A. 40).

The trial court accepted the arguments made by the prosecutor that Park's criminal liability could only be determined by the jury and therefore declined judgment of acquittal (J.A. 42, 59, 66). Park testified in his own defense concerning the care taken in sanitation matters; on cross-examination he acknowledged that he was chief executive officer of Acme and therefore ultimately responsible for anything which occurred in the company (J.A. 57).

Over objection, the prosecutor introduced detailed evidence concerning an alleged prior offense involving a rodent infestation in Acme's Philadelphia warehouse in March 1970 (J.A. 51-55). The evidence of this alleged prior offense was repeatedly referred to by the prosecutor and emphasized in his summation (J.A. 60-62).

The trial court's charge to the jury was largely taken from the government's requested instructions. On the crucial instruction concerning Park's personal liability, to which defendant took vigorous exception, the court stated that the jury might convict Park if they found that respondent "held a position of authority and responsibility in the business of Acme Markets" (J.A. 63). The text of the charge quoted in the petition (pp. 5-6) omits those portions which the court of appeals found most objectionable and confusing. For the convenience of the Court, the entire substantive text of the charge as designated for inclusion in the Joint Appendix (and which omitted only the standard language concerning crediability of witnesses, burden of proof, and other matters not in dispute in the instant case) is reprinted as Appendix C to this brief (*infra*, pp. 17-18). The jury returned a verdict of guilty on all counts.

Extensive post-trial proceedings were had in which defendant renewed his objections to the charge and the admission of evidence, and also sought an acquittal on motions and affidavits alleging an abuse of prosecutorial discretion in the government's having prosecuted Park solely because of his position as chief executive officer and notwithstanding his lack of any direct connection with the Baltimore violations, contrary to the government's long-standing practice in all other reported and unreported cases (J.A. 72-144). The trial court initially indicated a belief that the defense of abuse of prosecutorial discretion had been made out and that the motion for acquittal should be granted (J.A. 133). The court subsequently concluded that "this case comes as close to an abuse of that discretion as any one you would find," but that the court should not "impose its own feelings" and therefore "reluctantly" concluded that the motion must be denied (App. 143-144). The court then imposed a fine of $50 on each of five counts, substantially less than the one

year's imprisonment or $1,000 fine, or both, provided for a first offense under 21 U.S.C. § 333(a), stating that by imposing this sentence he would "reinforce" his previous "comments" on the merits of the prosecution's case (J.A. 144).

2. A divided panel of the court of appeals reversed the judgment of conviction and remanded the case for a new trial. The majority held that the charge did not correctly state the law as declared in *United States* v. *Dotterweich*, *320* U.S. 277. The court stated that *Dotterweich* dispensed with the need to prove "awareness of wrongdoing" by Park but did not dispense with the need to prove that Park was "in some way personally responsible for the act constituting the crime" (App. 4A). The court concluded that since the statute prohibits "causing" the adulteration of food, the conduct required to be proved would be "acts of the accused which *cause* the adulteration of such food"(App. 4A). (Emphasis by the court of appeals.) The court enlarged upon this standard by stating that such "action" by respondent "may be gross negligence and inattention in discharging his corporate duties and obligations or any of a host of other acts of commission or omission which would 'cause' the contamination of the food" (App. 6A).

In response to the contention that the requirement of such proof would make enforcement more difficult, the court stated:

> "Nevertheless, the requirements of due process are intended to favor fairness and justice over ease of enforcement. We perceive nothing harsh about requiring proof of personal wrongdoing before sanctioning the imposition of criminal penalties." (App. 6A.)

The court also held that the evidence of an alleged prior offense, not charged in the information, should

have been excluded because, as the case was tried and submitted to the jury, "there was no actual need for the Philadelphia evidence" (App. 8A). The court expressly allowed the district court on retrial "to determine the admissability of this 'prior crime' evidence in light of developments" (App. 9A).

REASONS FOR REFUSING THE WRIT

A. The decision below is correct.

Reversible error was committed in the trial court's instructions to the jury because the prosecutor induced the trial court to rely *not* on the "opinion of the Court" in *Dotterweich,* delivered by Mr. Justice Frankfuter for a five-Justice majority, 320 U.S. at 278-85, but instead to rely on the language and reasoning of the *dissenting* opinion written by Mr. Justice Murphy. 320 U.S. at 285-93.

The Solicitor General has continued this error by again relying, at page 9 of the instant petition, on Mr. Justice Murphy's dissent as the authoritative opinion in the *Dotterweich* case. The petition argues (p. 9) that the jury in *Dotterweich* convicted a corporate officer:

> "even though he had no personal knowledge of the misconduct involved, and there was no evidence of any 'personal guilt' on his part. 320 U.S. at 286 (Murphy, *J.* dissenting)."

The opening paragraph of the dissent in *Dotterweich* states the argument of the four-Justice minority against affirmance of the conviction of a corporate officer. According to Mr. Justice Murphy:

> "There is no evidence in this case of any personal guilt on the part of the respondent. . . . Guilt is im-

puted to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation." 320 U.S. 285-86.

One of the government's requested instructions submitted to the trial court in the instant case also sought to impute guilt to respondent Park "solely on the basis of his authority and responsibility as president" of Acme. This instruction (No. 3) was intended by the government to summarize four factual elements necessary to convict both Acme and Park. The first two elements referred to factual proof of interstate shipments and the holding of goods under unsanitary conditions; the third element referred to Acme's liability (and became irrelevant when Acme pleaded guilty); the text of the fourth element, in its entirety, was as follows:

> "4. As to the defendant, John R. Park, that he held a position of authority and responsibility in the operation of the business of Acme Markets, Inc."

This text is followed by citations to *Dotterweich* and two other cases, *United States* v. *Berger,* 200 F.2d 818 (8th Cir. 1952), and *United States* v. *Kaadt,* 171 F.2d 600 (7th Cir. 1949).

Neither the court of appeals decisions nor the opinion of the Court in the *Dotterweich* case contains the language requested by the prosecutor; that language appears only in the dissent by Mr. Justice Murphy.

The trial court charged the jury on the crucial issue of Park's liability in the exact words requested by the prosecutor. After defining the elements of interstate shipment and unsanitary conditions, the trial court stated:

> "Thirdly, that John R. Park held a position of authority in the operation of the business of Acme Markets, Incorporated.

> "However, you need not concern yourselves with the first two elements of the case. The main issue for your determination is only with the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets." (J.A. 63).

This portion of the charge, combined with other portions reflecting the view that criminal liability might exist without evidence of any "personal guilt" on the part of the respondent, as Mr. Justice Murphy contended had been done in *Dotterweich* and as the Solicitor General now contends in the instant petition (p. 9), caused the court of appeals to reverse.

The court of appeals was correct in rejecting the contention that a conviction could be had without evidence of any "personal guilt," because the *Dotterweich* opinion does require proof of personal guilt, although not proof of awareness of wrongdoing by the defendant.

The *Dotterweich* prosecution was against both a corporation in business as a drug jobber and a corporate officer. Contrary to Mr. Justice Murphy's claim that there was "no evidence of personal guilt on the part of the respondent [Dotterweich]," the printed Record filed in this Court shows not only that Dotterweich was personally responsible for every aspect of the corporate defendant's business but also that he testified at trial in a manner which emphasized that personal responsibility.

The violations charged in the case arose from two shipments of digitalis alleged to be less potent than required by law and a shipment of pills alleged to be misbranded because the contents, although correctly stated on the label, did not conform with the National Formulary definition. The defendants vigorously defended on the merits of every issue, claiming that the digitalis was of proper potency, attacking the government's tests, and contending that the pills were properly labeled. Except

for expert witnesses, the defendant's testimony was presented by Dotterweich himself, who was called and recalled on four separate occasions in a two-day trial (Record 125, 140, 156, 159). The evidence showed that the corporate defendant had been "created" (in the words of defense counsel) (R. 63) by Dotterweich, was owned by him, had approximately 26 employees, working on one floor of an office building, with Dotterweich as president, "General Manager," and the only supervisor. During testimony by Dotterweich, his counsel almost invariably used the word "you" to refer to actions taken in respect of the challenged shipments even when referring to actions taken by other employees who worked under Dotterweich's supervision, such as "I show you the original order that *you* sent" (R. 128); "did you *buy* any digitalis tablets from any other concern?" (R. 141); and "Mr. Dotterweich, did *you* continue so to sell digitalis tablets from that batch after that?" (R. 142). (Emphasis added.) On cross-examination, Dotterweich admitted that "When I am in the place, I am in charge," that he was "the boss," and that he must have been in charge on a day when one of the challenged shipments went out since he had signed a letter that day in his capacity as "General Manager" (R. 143-44).

The jury in the *Dotterweich* case found the individual defendant Dotterweich guilty on all counts but disagreed as to the guilt of the corporation. The verdict is readily explained by the extent to which the defendant's evidence had been identified with Dotterweich personally, particularly by the use of the words "I," "my," "his," and "you," while the corporate defendant was infrequently referred to except in the formal identification of documents and other exhibits.

The court of appeals carefully considered the evidence shown in the Record in the *Dotterweich* case, and compared that evidence with both the charge and the evidence adduced against respondent Park in the instant case, before concluding that "the facts of *Dotterweich* estab-

lished the personal responsibility which we find lacking in the case before us" (App. 3A-4A n.3).

The charge not only quoted from, and relied on, the dissenting opinion in *Dotterweich*, but also misconstrued an important phrase from the opinion of the Court. Near the end of the charge, the trial court instructed the jury that Park might be convicted if he "had a responsible relation to the situation, even though he may not have participated personally" (J.A. 64). This statement was inconsistent with the holdings in *Dotterweich*. The words "responsible relation" are used at two places in the opinion, 320 U.S. at 281, 285, but not as a substitute for a defendant's having "participated personally" in the offense. To the contrary, the first use of "responsible relation" is in reference to persons "acting at hazard," 320 U.S. at 281, and the second use is in connection with the "variety of conduct" which may constitute an offense. 320 U.S. at 285. The opinion uses a similar phrase, "such a responsible share," 320 U.S. at 284, to define those who may have committed an offense. All three uses of the word "responsible" are closely tied to the holding, also at page 284, to the effect that the individuals who may be convicted of violations of the Act are those "who according to settled doctrines of criminal law are responsible for the commission of a misdemeanor."

The government also seeks to rely on a comparison of the charge in the trial court in the instant case with the actual text of the charge given by the district court in *Dotterweich* (Petition, 13 n.6). But the actual charge given in *Dotterweich* is not a satisfactory model for the instant case because in *Dotterweich* both defendants sought to establish the defense that no violation whatsoever had been committed, rather than the defense asserted in the instant case that a particular individual was not criminally liable for conceded violations by a corporate defendant; instructions appropriate to the latter defense were neither requested nor desired in the *Dotterweich* case.

B. Enforcement of the Act will not be impeded by the requirement that the prosecution establish acts of commission or omission which caused the violations.

The requirement that individual criminal liability be established by proof of acts of commisson or omission by the accused "which cause the adulteration" of the food (App. 4A) is derived directly from the text of the Act itself, *supra* at p. 3, by which "the following *acts* and the *causing thereof* are prohibited . . ." (Emphasis added.) Unless this requirement were to be deleted by amendment to the Act, there would be no proper occasion for a construction of the statute which would allow guilt upon lesser evidence, regardless of any effect upon the government's ease of obtaining convictions.

But the record of enforcement of the Act, as reflected in reported appellate decisions, shows that the government has rarely, if ever, attempted to establish individual criminal liability in cases which did not involve facts to establish "the personal responsibility" which the court of appeals found "lacking" in the instant case (App. 4A). The reported decisions relied on in the petition (pp. 11-12) all involved such facts. In *H.B. Gregory Co.* v. *United States,* No. 73-1744 (7th Cir.), decided March 14, 1974, pending on petition for a writ of certiorari, No. 74-142, the facts established that the individual defendant "was in charge of the sanitation program and specifically the rodent control program in the warehouse; and that he was there on a daily basis" (Appendix 1 to the petition, opinion of the court of appeals, pp. 5-6). In *United States* v. *Shapiro,* 491 F.2d 335 (6th Cir. 1974), the individual defendant had *pleaded guilty* and received a "probated two-year sentence" conditioned upon compliance in the future with the Act. The holding of the court of appeals that the defendant could not avoid revocation of his probation by pleading the defense that the business was

subject to agreement of sale at the time of the violations is entirely consistent with the holding of the court of appeals in the instant case. *United States* v. *Cassaro, Inc.,* 443 F.2d 153 (1st Cir. 1971), involved evidence (appearing from the opinion to have been uncontested) that the individual defendant ordinarily was present at the bakery in which the violations were found and was personally in charge of its operations. 443 F.2d at 154, 157. The individual defendant's only contention on appeal was that he had been temporarily "out sick" at the time of the inspection. In *Lelles* v. *United States,* 241 F.2d 21 (9th Cir. 1957), *cert. denied,* 353 U.S. 974, the individual defendant was charged with having "personally" caused the offenses, 241 F.2d at 24, and was convicted even though the corporate defendant was ordered acquitted. *United States* v. *Kaadt,* 171 F.2d 600 (7th Cir. 1948), is a case similar to *Dotterweich* in which the individual defendants took responsibility for distributing a drug, with printed matter signed by one of the individual defendants, but contended that no violation whatsoever had been committed by anyone, corporation or individual. *United States* v. *Parfait Powder Puff Co.,* 163 F.2d 1008 (7th Cir. 1947), *cert. denied,* 332 U.S. 851, does not involve individual criminal liability. In *United States* v. *Diamond State Poultry Co.,* 125 F. Supp. 617 (D. Del. 1954), the two individual defendants were so much a part of the activities from which the violations arose that the court expressly found for the purpose of sentence that there was "an identity between individual and corporate defendants . . . ." 125 F. Supp. at 620.

In none of these cases did the government attempt to establish individual criminal liability without proof of acts of the accused which caused the violations.

Rather than representing a typical example of government enforcement of the Act, the instant prosecution is an unprecedented effort to extend individual criminal

liability beyond the limits established by the text of the Act itself, by the opinion of this Court in *Dotterweich,* and by the government's own previous good sense and sound discretion in prosecuting individuals only when evidence of personal responsibility has been established.

C. No occasion exists to review the conclusion of the court of appeals that "prior crimes" evidence had been introduced at trial without any purpose which might have outweighed the prejudice created to respondent.

The uniform rule is that evidence of other criminal offenses by a defendant, not charged in the indictment or information, is not admissable for any purpose, subject to very narrow and specific exceptions. *Boyd* v. *United States,* 142 U.S. 450, 458. In the instant case the government did not establish any purpose for the admission of such evidence which would have outweighed the prejudice resulting to respondent. The court of appeals concluded that "whether the need for and the persuasiveness and relevance of such evidence may outweigh its prejudicial effect, will, in large part, depend upon the prosecution's new approach to the presentation of its case" and left to the district court the determination whether or not to admit the "prior crime" evidence "in light of developments" in the new trial (App. 9A).

This portion of the court of appeals decision imposes on the government nothing more onerous than the obligation to justify with some sound reason the introduction of highly prejudicial evidence. A determination by this Court of the appropriate rule, if different from that declared in *Boyd,* 142 U.S. at 458, should await developments in the new trial, rather than occur against the background of a confused charge predicated upon an erroneous theory of individual criminal liability.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX C

INSTRUCTIONS TO THE JURY
(as designated for inclusion in Joint Appendix 62-64.)

* * * * *

Now, in this particular case, the Defendant is charged in five counts of violating the law.

The first four counts of the Information concern events that are alleged to have occurred in November and December of 1971.

The first count involves certain boxes of gelatin dessert, Jello. Counts two, three and four involve flour and count five also involves flour, but the time period on count five is different, since this concerned events that occurred in January and February of 1972.

All the counts arise from the alleged rodent infestation of various forms.

The Defendant in this case is charged under Section 331(k) of Title 21 of the United States Code. That provision makes it a criminal offense to do any act with respect to food that is being held for sale after shipment in interstate commerce if the result is adulteration of that food.

In order to find the Defendant guilty on any count of the Information, you must find beyond a reasonable doubt on each count, first, that the food that was held was held for sale in the Acme warehouse after shipment in interstate commerce.

Secondly, that the food involved was held in unsanitary conditions in a warehouse with the result that it consisted, in part, of filth or where it may have been contaminated with filth.

Thirdly, that John R. Park held a position of authority in the operation of the business of Acme Markets, Incorporated.

However, you need not concern yourselves with the first two elements of the case. The main issue for your determination is only with the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets.

The corporation, Acme Markets, Incorporated, has already entered a plea of guilty to the charge placed against it, and, while that plea does not imply, in any way, the Defendant Park is guilty, the fact that the materials in question are foods held for resale after shipment in interstate commerce and held under unsanitary conditions are issues that are beyond question in the case and must be accepted by you.

The statute makes individuals, as well as corporations, liable for violations. An individual is liable if it is clear, beyond a reasonable doubt, that the elements of the adulteration of the food as to travel in interstate commerce are present. As I have instructed you in this case, they are, and that the individual had a responsible relation to the situtation, even though he may not have participated personally.

The individual is or could be liable under the statute, even if he did not consciously do wrong. However, the fact that the Defendant is present and is a chief executive officer of the Acme Markets does not require a finding of guilt. Though, he need not have personally participated in the situation, he must have had responsible relationship to the issue. The issue is, in this case, whether the Defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose.

* * * * *